January 16, 2007

Susan H. Kuhbach
Senior Office Director for Import Administration
U.S. Department of Commerce
Central Records Unit, Room 1870
Pennsylvania Avenue and 14th Street, NW
Washington, DC 20230

Attn: Callie Conroy
David Layton

Re: Application of the Countervailing Duty Law to Imports from the People's Republic of China: Request for Comment

Dear Director Kuhbach:

On behalf of ICL Performance Products LP ("ICL"), and in response to the Commerce Department's recent request,[1] we hereby submit comments on whether the countervailing duty ("CVD") law should apply to imports from the People's Republic of China ("PRC"). Headquartered in St. Louis, ICL develops, manufactures and markets phosphates, phosphoric acid and phosphorus chemicals. Customers use our multifunctional products for food, pharmaceutical, industrial, and high-tech applications in diverse markets and applications—from baking and beverages, to cleaning products and water treatment, to asphalt and semiconductors.

In ICL's view, the CVD law should apply to imports from the PRC for three reasons.

(1) Unlike the CVD statute at issue in *Georgetown Steel*, the current statute permits application to the PRC.

The Commerce and U.S. Court of International Trade decisions reviewed in *Georgetown Steel* interpreted the term "bounty or grant" in Section 303 of the Tariff Act of 1930.[2] That term remained in place even after the Trade Agreements Act of 1979 ("the 1979 Act") restructured the CVD laws. Similarly, the 1979 Act did not clarify whether CVD law applied to non-market

[1] Application of the Countervailing Duty Law to Imports From the People's Republic of China: Request for Comment, 71 Fed. Reg. 75,507 (Dec. 15, 2006).

[2] *Georgetown Steel Corp. v. United States*, 801 F.2d 1308, 1309 (Fed. Cir. 1986) (focusing on whether Section 303 of the Tariff Act of 1930 applied to subsidies granted by NME countries) (hereinafter *Georgetown Steel*).

economy ("NME") countries, although the 1979 Act did expressly reenact provisions applying antidumping ("AD") law to NMEs.

The current statute, by contrast, repeals Section 303 of the Tariff Act of 1930 and concerns not a "bounty or grant" but a "countervailable subsidy." 19 U.S.C. § 1671. The amended terminology comes from revisions that Congress made through the 1994 Uruguay Round Agreements Act ("URAA"). The current statutory definition of "countervailable subsidy," 19 U.S.C. § 1677(5), specifically implements the WTO Agreement on Subsidies and Countervailable Measures ("SCM Agreement").[3] On its face, the definition does not limit its application to market economy countries. Similarly, no provision in the current CVD statute itself, 19 U.S.C. § 1671, expressly prohibits application to an NME.

In light of the statutory revision described above, *Georgetown Steel* should not control the outcome of Commerce's current review of whether to apply CVD law to NMEs such as the PRC.

(2) Since it became a WTO member in 2001, the PRC has been subject to the SCM Agreement, regardless of whether U.S. law treats the PRC as an NME or a market economy.

As provided in Article 15(b) of the PRC's WTO Accession Protocol, members may, consistently with Part V of the SCM Agreement, both treat the PRC as an NME and impose CVDs against it.[4] In authorizing permanent normal trade relations ("PNTR") with the PRC in conjunction with its WTO accession, Congressional provisions for monitoring and enforcing the PRC's WTO commitments appropriated funds necessary for "defending United States antidumping and *countervailing duty* measures with respect to products of *the People's Republic of China*." 22 U.S.C. § 6943(a) (emphasis added). Indeed, a U.S. failure to apply CVD law to the PRC confers on it an unjustified differential trade benefit, thereby violating the most-favored nation requirement of Article I of the 1994 General Agreement on Tariffs and Trade.

A rational interpretation of that requirement would subject the PRC to the same CVD laws and regulations that apply to imports from Canada, the European Union or Japan.

(3) The PRC is clearly subsidizing imports.

The PRC's five-year plans establish tax benefits, refunds, preferential financing, export incentives and other financial benefits targeted at manufacturers producing exported merchandise

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[3] Statement of Administrative Action ("SAA"), 1994 U.S.C.C.A.N. at 4238.

[4] *See* China Accession Protocol, Art. 15(b), WT/L/432 (Nov. 23, 2001) at 9.

or specific industries. The United States has challenged these programs and sought the PRC's explanation for them.

In October 2004, for example, a U.S. allegation that various industries in the PRC benefited from government subsidies identified over 15 different programs.[5] These programs included, among others: (a) export incentives, (b) preferential tax rates contingent upon exportation, (c) income-tax refunds contingent upon maintaining an "export-oriented" business, (d) Value Added Tax ("VAT") rebates on exports, (e) VAT rebates on imported capital equipment used for the production of export goods, (f) low-interest loans for companies that achieved more than $500,000 in direct exports, (g) refunds or credit for interest payments on loans to state-owned companies, and (h) direct assistance to particular industry sectors.[6] Likewise, in July 2006, a list of supplemental questions that the United States submitted to the WTO's SCM Committee identified a number of programs through which PRC manufacturers received a VAT rebate or exemption not available on purchases of imported equipment or raw materials.[7] The July 2006 submission also identified numerous specific subsidies to PRC industries.[8]

Not surprisingly, then, the U.S.-China Economic and Security Review Commission's 2006 Annual Report to Congress has again[9] recommended that Congress enact legislation to make CVDs apply to NMEs.[10] On April 4, 2006, Assistant U.S. Trade Representative Timothy Stratford testified that the PRC is engaged in "excessive government subsidization benefiting a range of domestic industries in China."[11] A witness for the U.S. steel industry identified various subsidies bestowed on PRC steel producers.[12] Thus, the U.S.-China Economic and Security

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[5] *See* G/SCM/Q2/CHN/9 (Oct. 6, 2004).

[6] See id.

[7] *See* G/SCM/Q2/CHN/19 (26 July 2006).

[8] See id.

[9] The Commission's 2005 Report at 77 contained a similar recommendation.

[10] *See* U.S.-China Econ. & Sec. Rev. Comm'n, 2006 Annual Report (Nov. 2006) at 55, available on-line at http://www.uscc.gov/annual_report/2006/06_annual_report.php; *see also* 22 U.S.C. § 7002 (creating the U.S.-China Economic and Security Review Commission).

[11] Written Testimony of Timothy Stratford, Asst. U.S. Trade Rep., before the U.S.-China Economic and Security Review Commission (Apr. 4, 2006), available online at http://www.uscc.gov/hearings/2006hearings/written_testimonies/06_04_04wrts/06_04_04_stratford.php.

[12] *See* Written Testimony of Alan Price, Wiley Rein & Fielding, on behalf of the American Iron & Steel Institute and the Steel Manufacturer's Association, before the U.S.-China Economic and Security Review Commission (Apr.

Review Commission, the U.S.T.R. and private industry agree that the PRC government has subsidized domestic production through diverse means.

Conclusion

For the reasons stated above, ICL respectfully submits that the CVD law should apply to imports from the PRC. The 1994 URAA repealed the statute at issue in *Georgetown Steel*. The PRC's 2001 accession to the WTO subjected it to the SCM Agreement regardless of NME status. And the United States has repeatedly sought to have the PRC stop providing export subsidies and explain more fully their operation. A continuation of Commerce's past policy would encourage the PRC not merely to keep subsidizing exports but to increase its subsidies until Commerce determines that the PRC is not an NME.

Respectfully submitted,

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4, 2006), available online
at http://www.uscc.gov/hearings/2006hearings/written_testimonies/06_04_04wrts/06_04_04_price.php.